207282

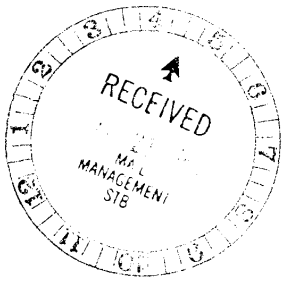
STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoe.com

Samuel M. Sipe Jr.
202.429.6486
ssipe@steptoe.com



February 21, 2003

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Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of the Written Testimony of the Association of American Railroads.

Please date stamp the extra copy of this cover letter and return it to the messenger who delivered this filing.

Sincerely,

Samuel M. Sipe Jr.
Counsel for The Association
of American Railroads

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE CHALLENGES TO BE CONSIDERED UNDER THE STAND-ALONE COST METHODOLOGY

WRITTEN TESTIMONY OF THE ASSOCIATION OF AMERICAN RAILROADS

Of Counsel:

Henry Light
James A. Squires
George A. Aspatore
Norfolk Southern Railway Company

Peter J. Shudtz
Paul R. Hitchcock
CSX Transportation, Inc.

J. Michael Hemmer
Louise Anne Rinn
Union Pacific Railroad Company

Richard E. Weicher
Michael E. Roper
The Burlington Northern and Santa Fe
Railway Company

Paul Guthrie
Canadian Pacific Railway Company

Serge Cantin
Theodore K. Kalick
Canadian National Railways Company

William J. Wochner
Kansas City Southern Railway

Samuel M. Sipe, Jr
Anthony J. LaRocca
Cynthia L. Quarterman
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

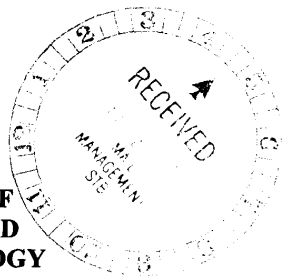
Louis P. Warchot
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 2001
(202) 639-2504

Dated: February 21, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 638

PROCEDURES TO EXPEDITE RESOLUTION OF RAIL RATE CHALLENGES TO BE CONSIDERED UNDER THE STAND-ALONE COST METHODOLOGY



WRITTEN TESTIMONY OF THE
ASSOCIATION OF AMERICAN RAILROADS

This is the written testimony of the Association of American Railroads ("AAR"), submitted in response to the Board's procedural order served February 6, 2003 in the above-captioned proceeding. Since 1934, AAR has represented the interests of major freight railroads in North America. AAR has been involved in numerous proceedings before the Surface Transportation Board ("STB") and its predecessor agency, the Interstate Commerce Commission, involving issues related to rate regulation. These include proceedings relating to the ICC's adoption of market dominance standards,[1] the *Coal Rate Guidelines*,[2] the Uniform Railroad Costing System ("URCS"),[3] small shipper rate guidelines,[4] the review of access and

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[1] *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118 (1981).

[2] *Coal Rate Guidelines, Nationwide*, Ex Parte No. 347 (Sub-No. 1), 1 I.C.C. 2d 520 (1985).

[3] *Adoption of the Uniform Railroad Costing System as a General Purpose Costing System for All Regulatory Costing Purposes*, Ex Parte No. 431 (Sub-No. 1), 5 I.C.C.2d 894 (1989).

[4] *Rate Guidelines - Non-Coal Proceedings*, STB Ex Parte No. 347 (Sub-No. 2), 1 S.T.B. 1004 (1996).

competition issues,[5] *Market Dominance Determinations--Product and Geographic Competition,*[6] and matters related to the arbitration of rate disputes.[7]

AAR has previously submitted opening and reply comments in this proceeding supporting the Board's efforts to encourage consensual, private resolution of rail/shipper rate disputes using mandatory, non-binding mediation and to restrict discovery in stand-alone cost ("SAC") proceedings. AAR continues to support the Board's proposal for mandatory, non-binding mediation and agrees that more restrictive discovery standards are appropriate in SAC proceedings. In addition, AAR encourages the Board to consider other proposals to expedite the resolution of SAC cases. In the final section of this testimony, AAR offers several additional proposals for the Board's consideration to expedite SAC proceedings.

I. Proposed Mandatory Non-Binding Mediation

AAR's members strongly support market-based private sector resolution of disagreements over rate levels. Usually, direct negotiations between the railroad and its customers succeed and result in a negotiated rate. Where negotiation has failed, mediation is worth pursuing even if there is only a modest likelihood that mediation will result in a successful outcome. Non-binding mediation provides an opportunity for parties who have been unable to agree to reassess their positions by seeing them through the eyes of an unbiased third-party. In order for mediation to have a hope of succeeding, it must be structured such that neither party

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[5] *Review of Rail Access and Competition Issues*, STB Ex Parte No. 575, 3 S.T.B. 96 (1998).

[6] *Market Dominance Determinations--Product and Geographic Competition*, STB Ex Parte No. 627, 3 S.T.B. 937 (1998).

[7] *Arbitration--Various Matters Relating to its Use as an Effective Means of Resolving Disputes That Are Subject to the Board's Jurisdiction*, STB Ex Parte No. 586 (served May 22, 2002).

stands to gain an advantage in subsequent regulatory proceedings because of participating in mediation.

The Board's adoption of mediation should not affect the substantive rights of the parties. For example, AAR believes that the Board may not "fix the limitations period" for relief on rates already paid based on the onset of mediation as opposed to using the timing of the filing of a complaint to fix the limitations period as the statute clearly requires.[8] AAR also urges the Board not to adopt the recommendations of several shipper organizations which advocate requiring a railroad to establish common carrier rates several months prior to the expiration of a rail transportation contract. In addition to contradicting legal precedent,[9] requiring a railroad to establish rates before a negotiated contract term expires could jump start the regulatory process by shortening the period during which the parties usually attempt to negotiate a new transportation contract.

AAR believes that while a mediator should clearly have knowledge of the STB's relevant statutory standards, that individual should not, as some have suggested, be a member of the STB staff. Moreover, all matters discussed in mediation should be confidential, subject to a protective order, and should not become part of the record of a proceeding before the Board if mediation is unsuccessful.

II. Proposed Discovery Standards

AAR agrees with the Board that more restrictive discovery standards are appropriate in rate cases decided under the *Coal Rate Guidelines.* Given the substantive standards applicable in rate cases, it is the defendant carriers that bear the overwhelming burden

[8] 49 U.S.C. § 11705(c).

[9] *Burlington Northern R.R. v. STB*, 75 F.3d 685 (D.C. Cir. 1996).

of providing materials in response to requests by shippers. The *Coal Rate Guidelines* acknowledge that "shippers may require substantial discovery to litigate a case under [Constrained Market Pricing] CMP."[10] However, the *Guidelines* place certain constraints on shippers in making discovery requests. Under the *Guidelines*, a shipper seeking discovery should "state with particularity the nature and substance of the charges it seeks to prove, as well as the basis for its belief in those charges. In other words, it must demonstrate a real, practical need for the information."[11] The discovery requested should "be reasonably tailored to the particular charges to be proved and reflect the least intrusive means of obtaining the information."[12] Unfortunately, the discovery standards suggested in the *Guidelines* have been largely ignored in favor of the broader STB discovery standards, which merely require a showing of relevance.[13] The Board's proposal would reinvigorate the requirement of the *Guidelines* that there be a demonstrable need for discovery and that information that can not be readily obtained through other means be produced. AAR believes that these more focused standards would advance the goal of expediting discovery and reducing the costs and burdens of discovery on both the parties and the Board itself. AAR urges that if these more restrictive discovery standards are adopted they be even-handedly applied to discovery requested by shippers and railroads alike.

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[10] 1 I.C.C. 2d at 548.

[11] *Id.*

[12] *Id.*

[13] 49 C.F.R. § 1114.21.

III. AAR's Other Recommended Proposals To Expedite SAC Proceedings

In response to the Board's call for any other proposals that interested persons might wish to offer to expedite the resolution of SAC cases, AAR offers the following five specific proposals that the Board may wish to consider if it proposes additional measures to expedite such proceedings.

1. Initial Disclosures

With its complaint, a complainant should be required to provide certain initial disclosures, including documentation and supporting data sufficient to support some aspects of its claims. Specifically, a complainant should be required to provide documentation or other evidence supporting its claim that there is "an absence of effective competition from other rail carriers or modes of transportation."[14] Such a *prima facie* showing of market dominance should be a prerequisite to the Board's initial assumption of jurisdiction over the complaint. An initial disclosure of market dominance should vastly simplify a defendant's discovery requests to the complainant on the subject of market dominance. The Board should also consider requiring the complainant to file an initial URCS-based variable cost calculation with its complaint and thereby address the quantitative jurisdictional threshold. (*See* discussion at section III.3 *infra.*)

In addition to providing market dominance materials, a shipper should be required to provide documentation that fully discloses its future coal sourcing and transportation plans at the time it files its case. This information is central to a SAC case, but too often a defendant has to move to compel the shipper to supply this data or seek to obtain it from third parties.[15] If it

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[14] 49 U.S.C. § 10707(a).

[15] *Otter Tail Power Co. v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42071 (served Nov. 15, 2002); *Arizona Elec. Power Cooperative, Inc. v. The Burlington*

were supplied at the outset, the discovery defendants request would likely be more limited than it is today.

2. Standard Periods Covered by Discovery Requests

Another way in which the Board could simplify SAC cases in their early phase is to limit the period covered by discovery responses. Currently, complainants often request discovery materials that cover several years. It is then up to the defendant to negotiate a more reasonable time period for which to produce responsive material. As a practical matter, a complainant does not need more than one year of historical variable cost-related data from a defendant's records in order to make its variable cost presentation. Similarly, it does not need more than two years worth of data on matters relating to the stand-alone railroad's operating plan or construction costs to put together its SAC evidence.[16] Nonetheless, complainants request multi-year data regarding these matters and frequently come back several times during the course of a proceeding to request updates of that data. AAR believes that the Board could limit the period discovery responses must cover and provide that updating of discovery responses is not required, unless the defendant agrees to do so or the proceeding has been delayed to such an extent that previous discovery responses have become substantially outdated.

Northern and Santa Fe Ry. Co. and Union Pac. R.R. Co., STB Docket No. 42058 (served Dec. 31, 2001).

[16] In some circumstances, historical traffic and revenue data for a historical period longer than two years may be needed to create a complete SAC record.

3. Variable Costs

One of the most time-consuming and labor intensive aspects of current rate cases is the development of movement-specific variable costs calculations. During discovery, complainants often ask for movement-specific variable cost data that would either require railroads to perform a special study to develop it, such as fuel consumption data,[17] or for data that do not exist in a useable format, such as maintenance of way or road property cost data.[18] These discovery requests often lead to contentious and time-consuming disputes whose cost far outweighs the value of the underlying information.

The preparation of variable cost evidence has also become an unnecessary burden for the parties. As the practice has developed in recent rate cases, during the evidentiary phase, both complainants and defendants generally submit three rounds of variable cost filings. Those filings typically incorporate numerous movement-specific adjustments to URCS system average costs, which are based on elaborate studies, requiring the production of voluminous data. AAR submits that the effort that goes into the development and presentation of variable cost calculations that rely extensively on movement-specific adjustments is unnecessary in most SAC

[17] *Public Serv. Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42057 (served Feb. 1, 2002); *Texas Mun. Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42056 (served Feb. 9, 2001); *PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42054 (served Nov. 9, 2000).

[18] *Otter Tail Power Co. v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42071 (served Nov. 15, 2002); *Public Serv. Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. Co.*, STB Docket No. 42057 (served Sept. 25, 2002); *Arizona Elec. Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Ry. Co. and Union Pac. R.R. Co.*, STB Docket No. 42058 (served Sept. 11, 2002); *Northern States Power Co. Minnesota d/b/a Xcel Energy v. Union Pac. R.R. Co.*, STB Docket No. 42059 (served May 24, 2002).

cases. As required by statute, the Board has developed and prescribed a regulatory cost system in URCS that is sufficient to determine the costs of rail movements in most circumstances.

Movement specific adjustments to URCS are supposedly justified because they can produce calculations that are more accurate than system average URCS costs. Leaving aside the question of whether such adjusted costs are indeed more accurate, the fact is that in many rate cases there is no value in developing variable costs with a greater degree of accuracy than can be achieved through the use of unadjusted URCS costs. The variable cost calculation is needed to answer the threshold question of whether a challenged rate falls within the Board's jurisdiction, but *should* be needed for nothing more.[19] Where it is apparent to both parties that the r/vc ratio developed on the basis of URCS costs clearly exceeds 180 percent, movement specific adjustments to URCS costs should not be necessary.

AAR proposes that the Board explore revised procedures to avoid the expensive and time-consuming process of developing movement-specific adjustments to URCS variable costs, except in those relatively uncommon instances where it is necessary to develop variable costs with a high degree of precision.[20] Such instances would include (1) cases where there is a genuine dispute as to whether the r/vc ratio exceeds the jurisdictional threshold, and (2) the rare case, if indeed one arises, in which determining variable costs becomes a factor in determining the precise level of the maximum reasonable rate. The Board could also consider adopting

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[19] AAR recognizes that the Board has prescribed maximum reasonable rates based on 180 percent of variable costs in the past. This should not be a recurring phenomenon. The *Coal Rate Guidelines* recognized that railroads are entitled to substantial differential pricing and anticipated that coal rates producing r/vc ratios well in excess of the 180 percent jurisdictional threshold would be the norm. Moreover, properly applied SAC principles should not produce SAC maximum rates below the jurisdictional threshold.

[20] Should it determine to explore such a proposal, the Board could also consider whether to require the complainant to file its initial URCS variable costs calculation with its complaint.

principles for distinguishing between adjustments that are truly movement specific and those that are not.

4. Technical Conferences

AAR recommends that once the parties have made their evidentiary presentations in a rate reasonableness case, the Board staff convene a technical conference with the parties' experts to ask any technical questions necessary to clarify the record for the staff.[21] The staff could probe the calculations, formulas and models used by the experts to better understand how they operate and to assess their reasonableness. Such technical conferences could streamline the Board's preparation of a final decision.

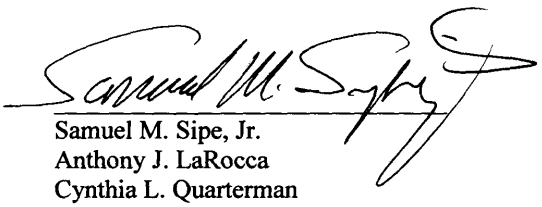
5. Treatment of Confidential Information in SAC Evidentiary Filings

Because of the commercially sensitive information contained in evidentiary filings in SAC cases, those filings are invariably filed with a highly confidential designation. After the filing of the evidence, the parties are left to negotiate with one another about what redactions should be made of highly confidential information to make those materials available to those employees of the parties who have a need to be familiar with the filings. There is no set time frame or format for when or how those redactions will take place and they can often be substantially delayed as each side begins to analyze the others' evidence. Even after redacted versions are eventually provided and produced to in-house personnel with a confidential designation, neither party makes the effort to provide a public version of the evidence available for public distribution. AAR recommends that the Board adopt specific guidelines for expedited

[21] This procedure would require parties to identify particular witnesses responsible for specific areas of testimony, a task that has become quite difficult given the Board's new rules calling for the submission of an evidentiary narrative as opposed to the filing of verified statements.

distribution of both redacted versions for client review and public versions for filing with the Board. Public access to SAC filings will permit potential parties to future proceedings to understand better the issues presented in individual cases and therefore more accurately assess Board precedent.

Respectfully submitted,



Of Counsel:

Henry Light
James A. Squires
George A. Aspatore
Norfolk Southern Railway Company

Peter J. Shudtz
Paul R. Hitchcock
CSX Transportation, Inc.

J. Michael Hemmer
Louise Anne Rinn
Union Pacific Railroad Company

Richard E. Weicher
Michael E. Roper
The Burlington Northern and Santa Fe Railway Company

Paul Guthrie
Canadian Pacific Railway Company

Serge Cantin
Theodore K. Kalick
Canadian National Railways Company

William J. Wochner
Kansas City Southern Railway

Dated: February 21, 2003

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Cynthia L. Quarterman
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

Louis P. Warchot
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2504

Attorneys for the Association of American Railroads

CERTIFICATE OF SERVICE

I hereby certify that this 21st day of February 2003, a copy of the Written Testimony of the Association of American Railroads was served by hand delivery or overnight mail on:

Gordon P. MacDougall
1025 Connecticut Avenue, N.W.
Washington, DC 20036

Attorney for John D. Fitzgerald and the United Transportation Union-General Committee of Adjustment

Richard E. Weicher
Michael E. Roper
2500 Lou Menk Drive
Fort Worth, TX 76131

Attorneys for the Burlington Northern and Santa Fe Railway Company

Steven D. Strege
Executive Vice President
North Dakota Grain Dealers Association
118 Broadway
606 Black Building
Fargo, ND 58102

North Dakota Grain Dealers Association

William L. Slover
C. Michael Loftus
John H. LeSeur
Kelvin J. Dowd
Christopher A. Mills
Slover & Loftus
1224 17th Street, N.W.
Washington, DC 20036

Attorneys for The Western Coal Traffic League

Rosalind A. Knapp
Deputy General Counsel
USDOT
400 7th Street, S.W., Room 10428
Washington, DC 20590

The United States Department of Transportation

Ray Hickman
OptionsNet
10435 S. Sandusky Ave.
Tulsa, OK 74137

OptionsNet

Jon H. Mielke
Executive Secretary
North Dakota Public Service Commission
600 E. Blvd. Ave., Dept. 408, 12th Floor
Bismarck, ND 58505-0480

North Dakota Public Service Commission

Thomas C. Canter
Executive Director
The National Coal Transportation Association
4 Meadow Lark Lane, Suite 100
Littleton, CO 80127-5718

The National Coal Transportation Association

Nicholas J. DiMichael
Michael H. Higgins
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

Attorneys for The National Industrial Transportation League

Michael F. McBridge
LeBoeuf, Lamb, Greene & MacRae, LLP
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20009-5728

Attorneys for Edison Electric Institute

Nicholas J. DiMichael
Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

George Koeck
Otter Tail Corporation
3203 32nd Avenue, S.W.
Suite 110
Fargo, ND 58103

Attorneys for Otter Tail Power Company

Carolyn F. Corwin
Elizabeth Martell Walsh
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004

J. Michael Hemmer
Louise A. Rinn
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

Attorneys for Union Pacific Railroad Company

Scott M. Mirelson